Supreme Court, U.S.
FILED
OCT - 6 2000
CLERK

(4)

No. 00-44

In the Supreme Court of the United States

MOBIL MINING & MINERALS, PETITIONER

v.

DAVID R. NIXSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
NATHANIEL I. SPILLER
Deputy Associate Solicitor
MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

18pp

QUESTION PRESENTED

Petitioner operates a manufacturing plant that is located on a ship channel. The plant receives raw materials and ships finished products by vessels. Respondent David R. Nixson was injured while working on a rail line within the plant's premises that is close to the water and petitioner's vessel-loading areas. The question presented is as follows:

Whether the rail line is part of an "adjoining area customarily used by an employer in loading [and] unloading * * * a vessel," and is thus a situs covered under Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Arjona v. *Interport Maint. Co.*, 31 Ben. Rev. Bd.. Serv (MB) 86 (1997)	5
Brady-Hamilton Stevedore Co. v. *Herron*, 568 F.2d 137 (9th Cir. 1978)	4, 5, 9
Brooker v. *Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir.), cert. granted, 524 U.S. 982, cert. dismissed, 525 U.S. 957 (1998)	13
Fleischmann v. *Director, OWCP*, 137 F.3d 131 (2d Cir.), cert. denied, 525 U.S. 981 (1998)	13
Gavranovic v. *Mobil Mining & Minerals*, 33 Ben. Rev. Bd. Serv. (MB) 1 (1999)	5
Herb's Welding, Inc. v. *Gray*, 470 U.S. 414 (1985)	9, 10
Jonathan Corp. v. *Brickhouse*, 142 F.3d 217 (4th Cir.), cert. denied, 525 U.S. 1040 (1998)	11, 12, 13
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977)	2, 7, 8
Prolerized New England Co. v. *Benefits Review Bd.*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981)	7, 9
Sidwell v. *Express Container Servs., Inc.*, 71 F.3d 1134 (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996)	8, 13

Cases—Continued: Page

Texports Stevedore Co. v. *Winchester*, 632 F.2d 504 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981) 4, 6, 8, 9
Triguero v. *Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991) 9

Statutes:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:
33 U.S.C. 902(3) 2, 10
33 U.S.C. 903(a) (1970) 8
33 U.S.C. 903(a) 2, 6, 8, 9, 12, 13
33 U.S.C. 908 2
33 U.S.C. 909 2
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251 9

Miscellaneous:

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972) 8, 9
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972) 9
U.S. Dep't of Labor, Employment Standards Admin., *LHWCA Program Memorandum No. 58* (Aug. 10, 1977) 7

In the Supreme Court of the United States

No. 00-44

MOBIL MINING & MINERALS, PETITIONER

v.

DAVID R. NIXSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 209 F.3d 719 (Table). The decision and order of the Benefits Review Board (Pet. App. 3a-8a) is unreported. The decision and order of the administrative law judge (Pet. App. 9a-35a) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 7, 2000. A petition for rehearing was denied on April 7, 2000 (Pet. App. 36a). The petition for a writ of certiorari was filed on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. To be covered by the Act, an injured employee must meet two requirements. The first, commonly known as the "status" requirement, is that the employee must be engaged in maritime employment.[1] The second, known as the "situs" requirement, is that the injury must have occurred on a maritime situs. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the "situs" requirement, imposed by Section 3(a) of the Act, which specifies that a disability or death is compensable only if it

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Mobil Mining and Minerals operates a fertilizer manufacturing plant located along the Houston Ship Channel. Pet. App. 2a, 4a. Petitioner receives raw materials and ships out finished fertilizer products by barge and ship, and it maintains four docks

---

[1] Section 2(3) of the Act defines "employee" (with certain exceptions not relevant here) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

at the plant for loading and unloading vessels. *Id.* at 14a. Petitioner also receives raw materials and ships fertilizer products by truck and railway. *Id.* at 4a.

Respondent David Nixson worked as an "A Operator" in petitioner's shipping and receiving division. Pet. App. 12a-13a. His duties included a variety of tasks involving the loading and unloading of barges, and during 1993 he spent 41% to 50% of his work time engaged in those activities. *Id.* at 5a. His responsibilities also included tasks relating to the loading and unloading of trucks and rail cars. *Id.* at 5a, 17a. Respondent testified that he had a 50% daily expectation of working on the waterfront when barges were present or expected, and that at times he was reassigned during the course of a workday from the rail area of petitioner's facility to the waterfront. *Id.* at 13a-14a.

On the day of his injury, respondent was assigned to the locomotive crew, moving rail cars into position for loading. While attempting to couple cars together, he severely injured his left arm. Pet. App. 4a n.1, 20a. The record contains a map (without a scale) of petitioner's manufacturing plant, showing the site of respondent's injury. See CX 11 (Facility Map) (reprinted following Pet. App. 49a). The record does not, however, reflect the distance between the water and the site of the injury. Although petitioner states (Pet. 3) that the injury site is not "even near" its docks, in the court of appeals petitioner acknowledged that the pertinent rail line is "physically close to the water's edge," Pet. C.A. Br. 14, where its docks are located. See Facility Map. The rail line runs along the back, landward side of Building 9 (labeled "Fertilizer Storage" on the Facility Map) and a rock storage dome, which are structures used in the

loading and unloading of vessels. See *ibid.*; Pet. App. 14a, 20a.[2]

3. Respondent sought benefits under the LHWCA. His claim proceeded to a hearing before a Department of Labor administrative law judge (ALJ).[3] Pet. App. 12a. With respect to the Act's status requirement, the ALJ noted the parties' stipulation that the maritime duties of loading and unloading vessels constituted 41%-50% of respondent's assignments, and that respondent's uncontradicted and credible testimony established that he had a 50% daily expectation of being assigned to maritime work. See *id.* at 31a. The ALJ concluded on that basis that respondent satisfied the LHWCA's status requirement. *Ibid.*

The ALJ also determined that respondent was injured on an LHWCA situs. Pet. App. 25a-29a. Citing *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 513 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981), the ALJ ruled that under Fifth Circuit precedent, the situs determination requires consideration of "all the circumstances." Pet. App. 27a. The ALJ focused in particular on factors derived from the decision in *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978) (Kennedy, J.).[4] He found that

---

[2] Petitioner was injured near the juncture of two tracks. Tr. 109. One of the tracks runs behind buildings used in the vessel loading and unloading process; the other track runs along the waterway between those buildings and the docks. Facility Map; see Nixson Br. in Opp. 4.

[3] Petitioner paid respondent benefits under state compensation law, but respondent would be entitled to higher benefits under the LHWCA. Pet. App. 4a.

[4] Those factors are the particular suitability of the site for maritime uses referred to in the statute; whether adjoining properties are devoted primarily to maritime uses; the proximity of

petitioner's site on the Houston Ship Channel is suitable for its maritime receipt and shipment of materials, and was a "definite benefit" to petitioner; that petitioner's docks located on the waterway are connected to storage and manufacturing areas by conveyor belt systems; and that the facility arguably could not have been closer to the water. Pet. App. 27a. Based on those factors, the ALJ concluded that because petitioner's facility is in the vicinity of navigable waters and is used to load and unload vessels, it is a situs covered by the LHWCA. *Id.* at 27a-29a.

4. The Benefits Review Board affirmed. Pet. App. 3a-8a. The Board largely relied on its decision in *Gavranovic* v. *Mobil Mining & Minerals*, 33 Ben. Rev. Bd. Serv. (MB) 1 (1999), which held that a claimant in the same job classification as respondent at petitioner's Houston Ship Channel facility satisfied the Act's status and situs requirements. Pet. App. 6a-8a. The Board concluded that "[b]ecause the present case involves the same facility and the same employee classification and duties as the Board addressed in *Gavranovic*," respondent Nixson was entitled to LHWCA benefits "for the reasons set forth in *Gavranovic*." *Id.* at 7a.[5]

---

the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances. Pet. App. 27a. Although the ALJ cited a Benefits Review Board decision as authority for the factors, see *ibid.* (citing *Arjona* v. *Interport Maint. Co.*, 31 Ben. Rev. Bd. Serv. (MB) 86, 87 (1997)), those criteria are derived from *Brady-Hamilton*. See 568 F.2d at 141.

[5] The Board in *Gavranovic* concluded that an "A" operator at the Houston Ship Channel facility was a maritime "employee" within the meaning of the Act (see note 1, *supra*) because he had regular involvement in the loading and unloading of vessels. Pet. App. 48a. The Board in *Gavranovic* also affirmed the ALJ's conclusion in that case that petitioner's entire facility is an

5. The court of appeals affirmed. Pet. App. 1a-2a. The court considered "the stipulated facts regarding both the particular site where the accident occurred and the surrounding area constituting Mobil's facility contiguous to the Ship Channel." *Id.* at 2a. The court concluded that "the 'area,' as distinguished from the pinpoint site of the accident, is a covered situs pursuant to the plain wording of § 903(a) of the LHWCA." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 16-19) that even where significant portions of a manufacturing plant are customarily used in loading and unloading vessels, injuries that occur in other portions of the facility are not compensable under the LHWCA. That argument is incorrect. Section 3(a) of the Act provides that an injury to a covered worker is compensable if it takes place "upon the navigable waters of the United States," including an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). As the Fifth Circuit has recognized, "[a]rea is a broad term" functionally defined, and the specific location of an injury need not be "customarily used" for loading or unloading if the broader area is. *Texports Stevedore Co.* v. *Winchester*, 632 F.2d 504, 515-516 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 905 (1981).

"adjoining area" that is "customarily used" for maritime purposes. *Id.* at 43a-47a.

In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 279-281 (1977), this Court endorsed the use of a facility-wide approach to questions of LHWCA coverage. The Court explained that respondent Caputo satisfied the Act's situs requirement because

> [t]he truck he was helping to load was parked inside the terminal area. As [the employer] correctly concedes, this situs "unquestionably met the requirements of § 3(a) of the Act, . . . because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships."

Id. at 279. The Court employed the same mode of analysis in holding that respondent Blundo had been injured at a situs covered by the LHWCA. *Id.* at 279-281.[6] Consistent with that approach, the court of appeals in the instant case refused to give controlling significance to the customary use of the "pinpoint site of the accident," and looked instead to the wider facility in which respondent worked. Pet. App. 2a; see *Prolerized New England Co.* v. *Benefits Review Bd.*, 637 F.2d 30, 39 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981).[7]

---

[6] Contrary to petitioner's contention (Pet. 12-13), the *Caputo* Court's endorsement of the facility-wide approach cannot plausibly be characterized as dictum. With respect to Caputo, the Court expressly agreed with the employer's concession that the situs requirement was satisfied "because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships." 432 U.S. at 279. The Court also made clear that the same analysis furnished an independent basis for its holding that Blundo was injured at a covered situs. *Id.* at 281.

[7] Cf. U.S. Dep't of Labor, Employment Standards Admin., *LHWCA Program Memorandum No. 58*, at 13-14 (Aug. 10, 1977) ("relevant 'area,' * * * is the entire maritime facility," and it

2. Focusing on the facility, rather than the precise location where the injury occurs, is supported by the purpose of the 1972 LHWCA amendments establishing the situs-and-status regime for coverage under the Act. Until 1972, the LHWCA extended coverage only to injuries that occurred "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. 903(a) (1970). As a result of that limitation on federal coverage and the disparity between the benefits payable under the Act and those provided under state workers' compensation laws, benefits awarded to longshore or harbor workers could vary substantially depending upon the side of the water's edge on which an accident occurred. See generally *Caputo*, 432 U.S. at 260-263; H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11

"does not defeat coverage of a shipbuilder's injury that the precise location where it occurred—for example, a fabrication shop—does not itself adjoin the water; it suffices if the overall *area* within which it occurred (generally a shipyard) adjoins the water"); *Sidwell* v. *Express Container Servs., Inc.*, 71 F.3d 1134, 1140 n.11 (4th Cir. 1995) (under Section 3(a) "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured"), cert. denied, 518 U.S. 1028 (1996).

Under the facility-wide approach employed in *Caputo*, petitioner's facility meets the Section 3(a) criteria. It is located directly on the Houston Ship Channel and therefore "adjoin[s]" navigable waters under any conceivable standard. Compare *Texports Stevedore*, 632 F.2d at 514 (test is whether a site is "close to or in the vicinity of navigable waters, or in a neighboring area"), with *Sidwell*, 71 F.3d at 1138-1139 (test is whether a site is " 'contiguous with' or otherwise 'touches' such waters"). In addition, petitioner engages in extensive maritime activity through loading and unloading of vessels, Pet. App. 15a-18a, thereby meeting the requirement that the area be "customarily used" for maritime purposes.

(1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 12-13 (1972).

Congress amended the Act in 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251, extending its coverage to specified landward locations and to "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a). That expansion of coverage to "rather large shoreside areas," *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 (1985), was designed to "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." H.R. Rep. No. 1441, *supra*, at 10-11; S. Rep. No. 1125, *supra*, at 13. Section 3(a) should therefore be construed so as to minimize the frequency with which individual workers walk in and out of coverage. See *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95, 101 (2d Cir. 1991); *Prolerized*, 637 F.2d at 39; *Texports Stevedore*, 632 F.2d at 514-515; *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 140-141 (9th Cir. 1978).

A facility-wide approach to the term "area" serves that purpose. By contrast, limiting the LHWCA's coverage to the component areas of a facility where loading or unloading occurs would cause workers like respondent Nixson, who regularly work in both vessel and rail loading areas, to shift frequently between LHWCA and state coverage. As the ALJ in this case emphasized, "to conclude that a worker like [respondent Nixson], who spends 50% of his work time loading and unloading barges and vessels, is covered only if he is injured while engaged in such maritime activity

would accentuate the 'walking in and out of coverage' that Congress intended to eliminate." Pet. App. 29a.[8]

3. Contrary to petitioner's contention (Pet. 14), this Court's decision in *Herb's Welding* does not cast doubt on the continuing vitality of the *Caputo* Court's analysis. The Court in *Herb's Welding* did observe in passing that under the LHWCA, "there will always be a boundary to coverage, and there will always be people who cross it during their employment." 470 U.S. at 426. The Court's holding in the case, however, was that the worker in question was not engaged in maritime employment. *Id.* at 421-426. In light of that disposition of the "status" question, the Court explained that it "need not determine whether [the worker] satisfied the Act's situs requirement." *Id.* at 427. Because petitioner does not contest the Benefits Review Board's determination that respondent Nixson satisfied the Act's status requirement, see Pet. App. 2a (noting that petitioner conceded the point in the court of appeals), *Herb's Welding* is essentially irrelevant to the question presented for this Court's review.[9]

---

[8] The 1972 amendments also imposed a new "status" requirement by amending the Act's definition of "employee." Because Congress did not wish to extend coverage to all workers who might be injured in the newly covered landward areas, it limited the Act's coverage to "person[s] engaged in maritime employment." 33 U.S.C. 902(3); see note 1, *supra*. In the context of this case, the status requirement would ensure that employees whose work extends only to manufacturing (rather than maritime) activities would not be covered by the LHWCA, even if they are injured while working within a maritime situs.

[9] The loading and unloading of vessels constituted 41%-50% of respondent Nixson's work assignments. Pet. App. 5a. By contrast, the individual whose claim was at issue in *Herb's Welding* was a welder whose "work had nothing to do with the loading or unloading process." 470 U.S. at 425.

4. Petitioner contends (Pet. 9-11) that the court of appeals' decision in this case conflicts with the decision of the Fourth Circuit in *Jonathan Corp.* v. *Brickhouse*, 142 F.3d 217, cert. denied, 525 U.S. 1040 (1998). That claim is incorrect.

In holding that the claimant in *Brickhouse* had not satisfied the LHWCA's situs requirement, the Fourth Circuit explained:

> At the time of his employment, Brickhouse was fabricating steel parts for an inland bridge in North Carolina. He was fabricating them in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine railway. Nor was it, we conclude, a similar type of facility that fits the catchall provision. While at the plant, the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant. On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were shipped from the plant, usually by rail or truck, either to an inland site or to a ship on navigable waters for installation. The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from that of the traditional longshoreman's workplace at the water's edge. When Brickhouse worked on ships, which he occasionally did, he traveled by land to the shipyards where he then installed fabricated parts. During these times, he was undoubtedly on a situs covered by the LHWCA. But while at the Tidewater Steel plant, his situs was no different than it

> would have been at any steel fabrication plant anywhere in the land.

142 F.3d at 222. The court noted as well that "the plant was almost a thousand feet from the water's edge, and it was not 'customary' for the plant's workers to move between land and water in any regular way." *Ibid.* The Fourth Circuit's analysis clearly assumes that application of Section 3(a)'s "other adjoining area" provision turns on the customary uses of the facility as a whole—not on whether the specific location of a claimant's injury is typically used for the loading, unloading, or building of vessels. Indeed, although the Fourth Circuit observed in passing that "[a]t the time of his injury, Brickhouse was working in a non-maritime bay of the plant," *id.* at 219, the specific location of the claimant's injury within the larger facility played no role in the court's resolution of the situs question.

The apparent thrust of the Fourth Circuit's opinion in *Brickhouse* is that *no* part of the relevant facility was "customarily used" for the loading, unloading, or building of vessels. Thus, the court explained that "the fact that components were, on rare occasions, shipped by barge from Tidewater Steel's dock is not meaningful. The barge dock on Tidewater Steel's property would be relevant only if barges were its 'customary' method of shipment and if its employees were longshoremen who customarily loaded the barge at the facility." 142 F.3d at 222. Since portions of petitioner's facility in this case are customarily used for loading and unloading vessels (see notes 5 & 7, *supra*), the Fifth Circuit's decision in this case is not in conflict with Fourth Circuit precedent. See Pet. App. 45a n.7 (Benefits Review Board concludes that the Fourth Circuit's approach "would not dictate a contrary result in [*Gavranovic*], as [peti-

tioner's] facility actually adjoins navigable waters and is used for loading and unloading vessels"); cf. *Sidwell*, 71 F.3d at 1140 n.11 (Fourth Circuit states that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured").[10]

5. Petitioner contends (Pet. 20) that this Court was "poised to clarify the meaning of the 'customarily used' standard when it granted certiorari" in *Brooker* v. *Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir.), cert. granted, 524 U.S. 982, cert. dismissed, 525 U.S. 957 (1998), but was deprived of the opportunity when the parties settled that case. *Brooker*, however, presented the question whether a seawall under construction was a covered situs. The petition for a writ of certiorari contended that the seawall in question was a "pier" within the meaning of Section 3(a), and that the Eleventh Circuit's contrary ruling conflicted with *Fleischmann* v. *Director, OWCP*, 137 F.3d 131 (2d Cir.), cert. denied, 525 U.S. 981 (1998), which held that a bulkhead was a "pier." 98-18 Pet. at 6, 10-11. The petition also argued that the seawall was an area customarily used for loading and unloading vessels, based on

---

[10] Although the Fourth Circuit in *Brickhouse* stated that "the steel fabrication plant where Brickhouse was injured was not a facility, the *raison d'etre* of which is its use in connection with the nearby navigable waters," 142 F.3d at 222 (internal quotation marks omitted), that assertion was in no way central to the court's analysis. And while the "*raison d'etre*" of petitioner's facility is not maritime in nature, the strong maritime connection between the facility and the water justifies its treatment as an LHWCA situs. See Pet. App. 15a, 27a (describing the large amount of raw materials that petitioner receives by vessel, the suitability of the site for such receipt, and the benefit petitioner receives from its waterfront location).

evidence that materials for the seawall's construction were regularly loaded and unloaded in the vicinity of the seawall. *Id.* at 13-14. Neither the Eleventh Circuit nor the petition for certiorari discussed the question whether the customary use of a portion of a manufacturing plant for loading and unloading vessels satisfies the LHWCA's "situs" requirement with respect to injuries that occur in other portions of the plant. The question on which this Court granted certiorari in *Brooker* is therefore largely unrelated to the question presented in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor

OCTOBER 2000